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OFFICE SUPREME COURT, U.S.
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IN THE

# Supreme Court of the United States

October Term, 1960

NO. 650

MISSOURI PACIFIC RAILROAD COMPANY,
*Petitioner*

v.

FRANK G. MENDOZA, *Respondent*

## PETITION FOR WRIT OF CERTIORARI

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# LIST OF AUTHORITIES

## CASES


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Tiller v. Atlantic Coast Line R. Co. (1943), 318 U.S. 54, 63 S.Ct. 444, 63 S. Ct. 451 — 9


## UNITED STATES STATUTES


28 U.S.C. 1257 — 2

IN THE

# Supreme Court of the United States

October Term, 1960

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No._____

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MISSOURI PACIFIC RAILROAD COMPANY,
*Petitioner*
v.
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## PETITION FOR WRIT OF CERTIORARI

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*To The Court of Civil Appeals for the Tenth Supreme Judicial District of Texas at Waco.*

Petitioner, Missouri Pacific Railroad Company, prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas at Waco entered in the above entitled and numbered cause on the 7th day of July, A.D., 1960.

### Citations To Opinion Below

The opinion of the Court of Civil Appeals (included in the record filed herein) is printed in Appendix "A" hereto, page 19, but is not officially reported. It is, however, printed in Vol. 337 Southwestern Reports, 2nd Series, at

page 622. The Court of Civil Appeals did not write an opinion in denying petitioner's motion for rehearing. The Supreme Court of Texas did not write an opinion in denying petitioner's application for writ of error or in overruling petitioner's motion for rehearing on application for writ of error.

## Jurisdiction

The judgment of the Court of Civil Appeals was entered on July 7, 1960. A timely motion for rehearing, filed on July 21, 1960, was denied on July 29, 1960. Thereafter, on August 26, 1960, an application for writ of error to the Supreme Court of Texas was duly filed which was denied by the Supreme Court of Texas on October 26, 1960. Thereafter on November 10, 1960, your petitioner filed a Motion for Rehearing on the Application of Writ of Error in the Supreme Court of Texas, which Motion for Rehearing was denied December 7, 1960. (Certified copies of each of these instruments are included in the transcript filed herein.)

The Court of Civil Appeals is thus the highest Court of the State in which a decision can be had within the meaning of 28 U.S.C., section 1257, as construed by this Honorable Court in

Michigan-Wisconsin Pipe Line Company v. Calvert, 74 S. Ct. 396, 347 U.S. 157, 98 Lawyers Ed. 583, rehearing denied;
Panhandle Eastern Pipe Line Company v. Calvert, 74 S. C. 528, 347 U.S. 931, 98 Lawyers Ed. 1083;
Michigan-Wisconsin Pipe Line Company v. Calvert, 74 S. Ct. 528, 347 U.S. 931, 98 Lawyers Ed. 1083.

Jurisdiction of this Honorable Court is invoked under 28 U.S.C. Sec. 1257, sub-section (3).

## Questions Presented

Does the record in this cause contain any evidence of probative value tending to show that the Petitioner was guilty of negligence on the occasion in question?

Does the term negligence, as used in the Federal Employers' Liability Act (45 U.S.C. Sec. 51, et seq.) embody the test of the reasonable and prudent man?

## Statutes Involved

The statute involved in the cause is 45 U.S.C. Sec. 51 (Federal Employers' Liability Act), which is printed as Appendix "B", Page 39, of this Petition. Also appended to this Petition, as Appendix "C", at Page 40, is 28 U.S.C. Section 1257, which is the statutory provision relied upon to invoke the jurisdiction of this Court.

## Statement of the Case

The issues presented for decision to this Honorable Court refer only to liability. Thus the Statement of the case will only present the evidence pertinent on the liability question. The facts with reference to liability are without substantial dispute and in our Statement we will refer principally to the testimony of the Respondent himself.

The Respondent received whatever injury he has, if any, while working in Petitioner's shops, while he and two co-employees were engaged in renewing brake-shoes on a locomotive. They had renewed four of the brake-shoes and were in the process of renewing the fifth when the incident in question occurred. One of the employees, Davis, was standing approximately four feet from the locomotive wheel, where the Respondent was located, holding the brake rig back so as to give the Respondent some slack

between the rigging and the wheel so that the brake-shoe could be fitted on. The other employee, Terry, was in the pit, underneath the locomotive. The Respondent placed the brake-shoe on top of the locomotive wheel and slid it around the locomotive wheel, but the shoe, instead of stopping at the place where it should have stopped, slid on down to the rail. No injury occurred, nor was anyone hurt by the shoe sliding on down to the rail. However since it was on the rail it was necessary that it be raised back up to the proper position which, according to the Respondent, was about 12 or 18 inches from the rail. The Respondent therefore reached down, on his knees, and, with the help of Terry, lifted the shoe back up to its proper location. It was after this job had been completed and the Respondent had stood up that he stated that he felt a burning sensation in his stomach and groin.

The Respondent testified on his own behalf, as follows:

> "There were five brake shoes to put on this engine and we were putting the last one on when the incident occurred. (S.F. pp. 20-21). When putting the other brake-shoes on we had divided up; sometimes I lifted the shoe, sometimes one of the other men lifted it. On this particular night I had put some of the brake-shoes up on the sheels and the other men had put some up.
>
> "On the particular occasion in question, I think I put the brake-shoe up on the wheel. Davis was pushing slack out of the brake rigging so that we would have room to work and Terry was in the pit. I put the shoe up by myself and was holding it as it came over the side of the wheel. Before I turned the shoe loose I asked Terry if he was ready, and he said "Yes, I am ready", and I replied, "Well here I go with the shoe", and I just let it go down. You just have to get your

hands off of it, because you can't hold it anymore, let it go. (S.F. pp. 21-22). *I do not know whether there was a bar there to catch it (the brake-shoe) or not.* I just asked him if he was ready to hold it and he said yes turn it loose. That's what I did and it went on down to the rail. I didn't say anything to him about it going on down to the rail.

"I don't remember another shoe before this one fell to the rail or not. *But in case they do, why, we just have to lift it and put it back, that's all.* It wasn't unusual for a shoe to slip on down to the rail. That happened lots of times. Once they get down on the rail, you just pick it up and push it up and put them in place (S.F. pp. 23, 24). We do that everyday. I did it the same way on this occasion as I had done on previous occasions. (S.F. p. 25). "I had never made any complaints or said anything to the foreman about having a bar or stand to catch the brake-shoe as it went by. We were doing it the way we always done it. I have long experience in doing this type of work and the foreman could be assured that I knew the correct way to do the work. (S.F. pp. 25-26). "It isn't at all unusual for a brake-shoe to slide down to the rail. (S.F. p. 50). On other occasions he had gotten down and lifted the shoe up just as I did on the occasion in question." (S.F. p. 51).

The rail—where the brake-shoe came to rest—was 30-36 inches above the concrete floor. Respondent got on his knees and picked the shoe up, about 10-12 inches. His co-worker, Terry, was assisting him to some extent, but he couldn't do too much, since he was on the inside. All the engines of this type have this type brake-shoe. The weight of this shoe was the same as the others. (S.F. pp. 52, 53, 54). The work was completed and Respondent had stood up before he felt any pain. (S.F. p. 54). Respondent admitted that he had used the key myself and that he